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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JAMES ROBERTS, Defendant and Appellant.	C082497 (Super. Ct. No. 16FE007455)

Defendant James Roberts challenges a condition of his probation authorizing the warrantless search of electronic storage devices, including cell phones and computers under his control. He contends the search condition: (1) is invalid under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*); (2) violates the California Electronic Communications

Privacy Act (Pen. Code, § 1546 et seq.; hereafter ECPA)[1] and the wiretap statute (§ 631); and (3) is unconstitutional under the Fourth, Fifth, and Fourteenth Amendments. He also argues the condition is unconstitutionally overbroad. We agree with the last contention, but not the others. Because the condition is overbroad, we will strike the electronic search condition and remand the case to the superior court to consider in the first instance whether the condition can be narrowed in a manner that will allow it to pass constitutional muster.

FACTUAL AND PROCEDURAL BACKGROUND

Having been charged with a violation of section 11379, subdivision (a) of the Health and Safety Code, which prohibits the sale or transport of a controlled substance, defendant pleaded no contest to the lesser related offense of violating Health and Safety Code section 11378--possession for sale of a controlled substance. The factual basis for the plea was given as follows: "On March 27, 2016, . . . defendant did unlawfully possess[] the controlled substance methamphetamine for the purposes of sales, specifically, the defendant had 14.3 grams with packaging on his person. If an expert were to testify in this matter, they would testify that the methamphetamine was possessed for the purposes of sales." Defendant waived preparation of a probation report.

Among the probation conditions imposed was a condition allowing the search of electronic storage devices. That condition provided in pertinent part: "Defendant shall submit his/her person, place, property, automobile, electronic storage devices, and any object under his/her control, including but not limited to cell phones and computers, to search and seizure by any law enforcement officer or probation officer, any time of the day or night, with or without a warrant, with or without his/her presence or further

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[1] Further statutory references to sections of an undesignated code are to the Penal Code.

consent. [¶] . . . [¶] Defendant shall provide access to any electronic storage devices and data contained therein, including disclosing and providing any and all information necessary to conduct a search."[2]

At the hearing for entry of plea and sentencing, defendant objected to the condition involving electronic storage devices. He argued that the condition was not tailored to him, that he had not had a cell phone on him when arrested, that the condition was overbroad because it allowed law enforcement to look at everything, that it invaded his privacy, and that the condition did not apply to him. The trial court responded: "The other side of that argument is that no one uses pay/owe sheets anymore. Cell phones, computers, those are all the depositories for storage of records of dealings in controlled substances plus they also are very commonly used to arrange for future transactions. Search warrant after search warrant, I've seen where as the officers are executing the search warrant there's a cell phone which is buzzing with text messages which are asking for opportunities to purchase the controlled substances. So I think in this case, given the charge, there is a nexus between the offense and the type of conduct which probation hopes to prevent and perform."

DISCUSSION

It is, of course, not necessary for a defendant to reject probation as a prerequisite to challenging the validity of his probation conditions. (*People v. Keele* (1986) 178 Cal.App.3d 701, 708.) Thus, a defendant may agree to probation with conditions without expressly waiving any challenge to the probation conditions. However, failure to timely

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[2] Probation was also conditioned on defendant submitting "his/her person, property and automobile and any object under defendant's control to search and seizure in or out of the presence of the defendant, by any law enforcement officer and/or probation officer, at any time of the day or night, with or without his/her consent, with or without a warrant." This condition has not been challenged and is not at issue.

object to a probation condition forfeits review of the objection on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 234-237.) In this case, defendant raised an objection on the grounds the condition violated his privacy, should not apply to him because it was unrelated to the facts of his case, and was overbroad. These objections were sufficient to preserve his appellate challenges on the basis of *Lent* (no relationship to the crime), overbreadth, and the Fourth Amendment (violation of privacy). In addition, although forfeited, we consider and reject defendant's state statutory and Fifth Amendment claims.

I

The *Lent* Factors

Courts have "broad discretion in fashioning terms of supervised release, in order to foster the reformation and rehabilitation of the offender, while protecting public safety." (*People v. Martinez* (2014) 226 Cal.App.4th 759, 764.) We review the imposition of a particular probation condition for abuse of discretion. (*Ibid*.) The trial court abuses its discretion if it imposes a condition that is arbitrary, capricious, or exceeds the bounds of reason. (*Ibid*.)

A probation condition is not an invalid abuse of discretion "unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' [Citation.]" (*Lent, supra*, 15 Cal.3d at p. 486, fn. omitted, superseded on another ground as stated in *People v. Wheeler* (1992) 4 Cal.4th 284, 290-292.) A probation condition is not invalid unless all three prongs are satisfied. (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*).)

The People do not argue that the first two prongs of *Lent* have been satisfied, thus impliedly conceding that the validity of the condition stands or falls on the third prong. The People rely on two California Supreme Court cases in arguing that the electronic device condition imposed was related to future criminality.

The first, *Olguin, supra*, 45 Cal.4th at page 379, upheld a probation condition requiring a defendant who had pleaded guilty to driving under the influence (DUI) of alcohol to notify his probation officer of the presence of pets at his residence. The court held that the condition was reasonably related to future criminality because it enabled a probation officer to properly supervise the probationer, thus helping to ensure that the probationer did not reoffend. (*Id*. at p. 381.) "The condition requiring notification of the presence of pets is reasonably related to future criminality because it serves to inform and protect a probation officer charged with supervising a probationer's compliance with specific conditions of probation." (*Ibid*.) Because the condition was in this way related to future criminality, it was a valid condition under *Lent*.

The People argue that, as in *Olguin*, the electronic device search condition is necessary to allow effective monitoring of defendant's activities while on probation. However, *Olguin* is distinguishable. An electronic device search condition, unlike the pet notification condition in *Olguin*, implicates defendant's constitutional rights. (*People v. Bryant* (2017) 10 Cal.App.5th 396, 401-402.) Additionally, the notification provision in *Olguin* was reasonable, and reasonableness is the ultimate question. "Not every probation condition bearing a remote, attenuated, tangential, or diaphanous connection to future criminal conduct can be considered reasonable." (*People v. Brandão* (2012) 210 Cal.App.4th 568, 574.) *Olguin* does not "compel[] a finding of reasonableness for every probation condition that may potentially assist a probation officer in supervising a probationer." (*People v. Soto* (2016) 245 Cal.App.4th 1219, 1227.) "The fact that a search condition would facilitate general oversight of the individual's activities is insufficient to justify an open-ended search condition permitting review of all information contained or accessible on the [defendant's] smart phone or other electronic devices." (*In re J.B.* (2015) 242 Cal.App.4th 749, 758.)

The second California Supreme Court Case, *People v. Ramos* (2004) 34 Cal.4th 494 (*Ramos*), is also distinguishable. The issue of Ramos's probation condition arose

when, prior to pleading guilty to three counts of murder, he moved to suppress evidence incriminating him of the murders, which had been found pursuant to a probation search. (*Id*. at pp. 504-505.) The probation condition was imposed after he was convicted of felony driving under the influence with injury. (*Id*. at p. 505.) The search condition allowed a blanket search of " 'his person, property and automobile, and any object under the defendant's control . . . at any time of the day or night with or without a warrant.' " (*Ibid*.) The court found that the challenge was timely because the probation condition had been imposed before the court adopted a rule requiring a defendant to object to the condition at the time of sentencing or forfeit the claim. (*Ibid*.)

The court held that the search condition was reasonably related to the DUI conviction because its purpose was to deter the commission of crimes and protect the public. (*Ramos, supra* 34 Cal.4th at pp. 505-506.) The court further held that the intrusion was de minimis and the defendant's expectation of privacy was greatly reduced because he was on notice that his activities were being monitored. (*Id*. at p. 506.) Furthermore, " 'when defendant in order to obtain probation specifically agreed to permit at any time a warrantless search of his person, car and house, he voluntarily waived whatever claim of privacy he might otherwise have had.' [Citation.]" (*Ibid.*)

Ramos is also distinguishable for two reasons. First, the issue in *Ramos* arose after Ramos had accepted the probation terms, been released on probation, suffered a probation search, and been convicted of a separate crime as a result of the search. Under those circumstances the court correctly determined that his expectation of privacy was "greatly reduced" and that he had waived his privacy claims. Here, by contrast, the issue arises at the imposition of the search condition upon defendant's objection that the search condition is invalid. There is no privacy waiver here, and we are more favorably disposed to an objection that the search terms are unreasonable when viewing them at this stage, than when a defendant is attempting to suppress evidence after he has been released upon his agreement to the search conditions.

Second, *Ramos* indicated that under the circumstances the search of Ramos's house and truck was de minimis. (*Ramos*, *supra*, 34 Cal.4th at p. 506.) Following the United State Supreme Court's opinion in *Riley v. California* (2014) ___ U.S. ___ [189 L.Ed.2d 430, 446] (*Riley*), we know that far from being de minimis, data stored on personal electronic devices implicates heightened privacy concerns: "Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." The issue in *Riley* was whether data on a cell phone seized during an arrest could be searched without a warrant. The court held that privacy concerns in digital cell phone data are quantitatively and qualitatively different from any other physical object carried on one's person.

In terms of quantity, a cell phone can carry at least 16 gigabytes of data, which translates to millions of pages of text. (*Riley*, *supra*, ___ U.S. at p. ___ [189 L.Ed.2d at p. 446].) "The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier." (*Id*. at p. ___ [189 L.Ed.2d at p. 447].)

"Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different. An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD. Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature

on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building." (*Riley, supra,* ___ U.S. at p. ___ [189 L.Ed.2d at pp. 447-448].)

Thus, a search of the data on a probationer's electronic equipment is not de minimis, and deserves heightened privacy protection. Accordingly, we conclude that the probation condition imposed in this case, allowing unlimited searches of electronic device data, would be unreasonable and invalid under *Lent* if the only connection to the underlying circumstances were to allow authorities to monitor the probationer's conduct. However, while the reason for imposing the condition is to allow monitoring in order to prevent future criminality, there is nevertheless a connection between the crime committed here and the search condition.

There is no evidence in the record that defendant used one or more electronic devices in committing the charged crime, but that is only because there is no evidence in the record as to how the crime was committed at all. Apart from defendant's argument below that he had no cell phone on his person when arrested, our knowledge of the crime begins and ends with the factual basis for the plea that was recited for the record, indicating defendant possessed 14.3 grams of methamphetamine for the purpose of sales.

In any event, the use of electronic devices in defendant's underlying crime is not a prerequisite to the validity of the electronic device search condition. The absence of facts that a defendant used electronic devices or social media to commit the underlying crime, does not make the search condition unreasonable as a matter of law. "The primary focus of *Lent's* third-prong jurisprudence has been on the particular facts and circumstances of the case before the court, rather than on establishing bright-line rules. [Citations.] This makes sense given that the appropriateness of a particular probation condition necessarily depends on a myriad of tangible and intangible factors before the trial court, including the defendant's particular crime, criminal background, and future prospects. It is for the trial court, with the assistance of the probation officer and other experts, to determine the

probation conditions that will permit effective supervision of the probationer. Under *Olguin*, our role in evaluating the third *Lent* factor is to determine whether there is a reasonable factual basis for the trial court to decide that the probation condition will assist the probation department to supervise the defendant. [Citation.]" (*People v. Trujillo* (2017) 15 Cal.App.5th 574, 584-585, review granted Nov. 29, 2017, S244650.)

The requisite connection between electronic devices and the particular facts and circumstances of this case is the fact that the crime of illicit drug sales, the crime for which defendant was arrested and charged, is one that experience has shown is often committed with the aid of an electronic device.

Evidence of this connection was submitted below in the form of a declaration of Sacramento Deputy Sheriff Sean Smith. He stated that individuals engaged in the sales or transportation of drugs keep "pay/owe sheets stored on computers, cellular telephones, and other digital storage devices such as thumb drives, external hard drives and SD or Micro SD cards." "Cellular telephone devices and/or tablets are commonly used to communicate with customers, co-conspirators, or competing narcotics traffickers via several different methods. Criminals often use simple text messaging applications, cellular telephone calls, email, instant/direct messaging functions within social media applications, or chat functions within various applications to do so. Contact lists often contain names and telephone numbers of co-conspirators, customers, and competing narcotics traffickers." "Narcotics traffickers/transporters also use electronic devices to access their social media pages and post videos, pictures, comments, and even locations of activity related to their illegal activities." Also, the trial court acknowledged that it was common for cell phones and computers to be used to arrange drug transactions.

Given the connection between the type of crime defendant committed and the common use of electronic devices to commit such crimes, it was not unreasonable under *Lent* to impose a search condition allowing the search of electronic device data.

II

The Electronic Communications Privacy Act and the Wiretap Statute

Defendant argues the search condition violates the ECPA and the wiretap statute. We disagree.

Section 1546.1, part of the ECPA, provides in pertinent part that a government entity shall not: "Access electronic device information by means of physical interaction or electronic communication with the electronic device." (§ 1546.1, subd. (a)(3).) However, a government entity may access such information, "[e]xcept where prohibited by state or federal law, if the device is seized from an authorized possessor of the device who is subject to an electronic device search as a clear and unambiguous condition of probation . . . ." (§ 1546.1, subd. (c)(10).)

Defendant recognizes that section 1546.1, subdivision (c)(10) allows the government to access his electronic data as a condition of probation, but argues the probation condition here did not satisfy the statute because it was not clear and unambiguous. The condition in question provided in full:

> "P.C. 1546 searchable - Defendant shall submit his/her person, place, property, automobile, electronic storage devices, and any object under his/her control, including but not limited to cell phones and computers, to search and seizure by any law enforcement officer or probation officer, any time of the day or night, with or without a warrant, with or without his/her presence or further consent.
>
> "Defendant being advised of his/her constitutional and statutory rights pursuant to Penal Code section 1546 et seq. in this regard, and having accepted probation, is deemed to have waived same and also specifically consented to searches of his/her electronic storage devices.
>
> "Defendant shall provide access to any electronic storage devices and data contained therein, including disclosing and providing any and all information necessary to conduct a search."

We find nothing ambiguous about this condition. It clearly provides that defendant has waived his rights under the ECPA. The condition does not violate the ECPA.

Defendant also argues his probation condition does not fall within the exception provided in section 1546.1, subdivision (c)(10) because the condition is invalid under *Lent* and does not comply with federal and state constitutional requirements. We conclude elsewhere in the opinion that the condition does not violate *Lent* and is not unconstitutional.

The wiretap statute, section 631, subdivision (a), prohibits any person from: "by means of any machine, instrument, or contrivance, or in any other manner, intentionally tap[ping], or mak[ing] any unauthorized connection, whether physically, electrically, acoustically, inductively, or otherwise, with any telegraph or telephone wire, line, cable, or instrument, including the wire, line, cable, or instrument of any internal telephonic communication system, or . . . willfully and without the consent of all parties to the communication, or in any unauthorized manner, read[ing], or attempt[ing] to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place within this state; or . . . us[ing], or attempt[ing] to use, in any manner, or for any purpose, or . . . communicat[ing] in any way, any information so obtained, or . . . aid[ing], agree[ing] with, employ[ing], or conspir[ing] with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things mentioned above in this section . . . ."

Subdivision (c) of section 631 provides that any evidence obtained in violation of the section is inadmissible in any judicial, administrative, legislative, or other proceeding.

The probation condition does not permit making an unauthorized connection, as the probationer has authorized the connection in exchange for probation. As to the requirement that all parties consent to the reading, etc., of the communication, this

applies only while the communication is in transit, or being sent or received. The information obtained by virtue of the probation condition has already been sent or received, and is not in transit.

III
Fourth Amendment

We review constitutional challenges to a probation condition de novo. (*People v. Appleton* (2016) 245 Cal.App.4th 717, 723.)

"The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order ' "to safeguard the privacy and security of individuals against arbitrary invasions . . . ." ' [Citation.] Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." (*Delaware v. Prouse* (1979) 440 U.S. 648, 653-654 [59 L.Ed.2d 660], fns. omitted.) Defendant argues that the intrusion on his Fourth Amendment interests, composed of the "substantial" scope of his interest and the "extraordinary" extent of the intrusion, outweighs the admittedly "important" government interest in preventing recidivism and integrating probationers back into the community.

Citing *United States v. Lara* (9th Cir. 2016) 815 F.3d 605, 610 (*Lara*), defendant argues that even though his privacy interest is limited by his probation status, it is still substantial. However, *Lara* decided the reasonableness of a probation search of the probationer's cell phone data pursuant to a condition that he " 'submit [his] person and property, including any residence, premises, container or vehicle under [his] control, to search and seizure . . . .' " (*Id*. at p. 607.) Thus, *Lara* involved a search condition that did not clearly apply to the search that was conducted. (*Id*. at p. 610.) *Lara* recognized the United States Supreme Court held in *United States v. Knights* (2001) 534 U.S. 112, 119-120, [151 L.Ed.2d 497], that "a probationer's reasonable expectation of privacy is

'significantly diminished' when the defendant's probation order 'clearly expressed the search condition' of which the probationer 'was unambiguously informed.' " (*Lara*, at p. 610.) As the issue is presented here, before an actual search and after defendant has accepted the conditions of probation, defendant's expectation of privacy as to the Fourth Amendment protections he has waived, are not substantial, as he claims.

Defendant's other claim regarding the intrusion into his Fourth Amendment interests is that the intrusion set forth in the probation condition is "extraordinary." For this proposition, he cites *Riley, supra,* ___ U.S. at p. ___ [189 L.Ed.2d at pp. 445-447]. However, *Riley* also involved a preconviction expectation of privacy, because the issue was whether cell phone data could be searched incident to arrest. A probationer who has been granted probation on the condition he submit to a warrantless search has no reasonable expectation of traditional Fourth Amendment protection. (*Ramos, supra*, 34 Cal.4th at p. 506.)

The State's interests, on the other hand, are substantial. "[A] State's interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." (*Samson v. California* (2006) 547 U.S. 843, 853 [165 L.Ed.2d 250].) On balance, and for the additional reasons that the search condition is valid under *Lent*, we conclude the electronic device search condition is not an unreasonable search condition, even though we also conclude the condition is overbroad under the circumstances presented here.

IV
Overbreadth

"A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) "The essential question in an overbreadth challenge is the closeness of the fit

between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

It is undeniable, after the Supreme Court's decision in *Riley*, *supra*, ___ U.S. at p. ___ [189 L.Ed.2d 430], that a probation condition allowing warrantless searches of the data contained in a probationer's electronic devices, implicates a probationer's constitutional rights. We must therefore determine if the search condition is closely tailored to the purpose of the condition. We shall conclude it is not.

The search condition at issue here is not limited in any respect as to the types of information that may be searched. It also includes not only defendant's own electronic devices, but also those "under his/her control." This condition is overbroad. The condition must be limited to electronic devices containing data that the defendant has the right to access, and must be more closely tailored to the purpose of the condition, which is to prevent defendant from engaging in future drug sales--the crime with which he was charged.

This court recently considered the validity of the same probation condition, and found it overbroad under the circumstances in that case. (*People v. Valdivia* (2017) 16 Cal.App.5th 1130, review granted Feb. 14, 2018, S245893 (*Valdivia*).) In concurring with the determination of overbreadth, our colleague made the following observations: "In the absence of further clarification in the wording of the search condition, 'control' in this context is reasonably understood to include constructive possession as well as actual possession or ownership. ' "Constructive possession does not require actual possession but does require that a person *knowingly exercise control* or *the right to control a thing*, either directly or through another person or persons." ' [Citation.] The scope of search conditions related to physical places typically focuses more on areas within defendant's control (e.g., home, vehicle, person) and defendant's actual or constructive possession of

items found therein, not ownership. Also, traditional notions of possession do not necessarily apply to *access* to applications, Internet activity, and social media accessible in electronic devices. A defendant could have physical control over, and thus possession of, someone's electronic device, but not have *access* to the contents thereof. Thus, the search condition here was not narrowly tailored to allow searches only of electronic devices owned by defendant or those to which defendant had access to the applications, data and other items contained therein." *(Id.* at pp. 1174-1175 (conc. & dis. opn. of Murray, J.), fn. omitted.)

We agree with our colleague that the search condition should be limited to the electronic devices owned by defendant or those to which he has access to the data therein.

The condition must also be limited as to the nature of the data that may be searched. As indicated, the purpose of the condition is to prevent defendant from committing the crime for which he was arrested and charged--sale of illicit drugs. Accordingly, the condition must be limited to data on defendant's electronic devices that is reasonably likely to contain indicia of drug sales. We leave the details of crafting such language to the trial court.

V
Fifth Amendment

Defendant argues the electronic device search condition "demands that the probationer essentially testify as to the existence of information, data, passwords, and accounts, and testify as to his knowledge of, access to, possession of, or control over, this data, about which the government, without appellant's testimony, would know nothing." Defendant contends this is a testimonial or communicative act and that the compelled production of the data violates his Fifth Amendment right not to give incriminating testimony against himself. We disagree.

"The Fifth Amendment to the United States Constitution states that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.' The high

court has made clear that the meaning of this language cannot be divorced from the historical practices at which it was aimed, namely, the brutal inquisitorial methods of ' "putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source." ' [Citations.] At its core, the privilege protects against the 'cruel trilemma of self-accusation, perjury or contempt.' [Citation.] Accordingly, the amendment prohibits the direct or derivative *criminal use* against an individual of 'testimonial' communications of an incriminatory nature, obtained from the person under official compulsion." (*People v. Low* (2010) 49 Cal.4th 372, 389-390.)

The search of data on defendant's electronic storage devices subject to a valid warrantless search condition does not implicate his Fifth Amendment rights. It is a "settled proposition that a person may be required to produce specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not 'compelled' within the meaning of the privilege [against self-incrimination]." (*United States v. Hubbell* (2000) 530 U.S. 27, 35-36 [147 L.Ed.2d 24, 35-36].) The Fifth Amendment is not a general protector of privacy. It "protects against 'compelled self-incrimination, not [the disclosure of] private information.' " (*Fisher v. United States* (1976) 425 U.S. 391, 401 [48 L.Ed.2d 39, 50].)

Moreover, assuming, without deciding, that the probation search condition is compulsive and that the information obtained is testimonial or communicative in nature, the condition does not in and of itself violate defendant's Fifth Amendment right because it does not authorize the use of any compelled statement in a criminal proceeding.

Minnesota v. Murphy (1984) 465 U.S. 420 [79 L.Ed.2d 409], relied upon by defendant, "addressed 'whether a statement made by a probationer to his probation officer without prior [*Miranda*] warnings is admissible in a subsequent criminal proceeding.' [Citation.] In the course of answering that question, the Court noted that 'if the State, either expressly or by implication, asserts that invocation of the privilege would

lead to revocation of probation, . . . the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.' [Citation.] In an accompanying footnote, the Court further asserted that 'a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. Under such circumstances, a probationer's "right to immunity as a result of his compelled testimony would not be at stake," [citations], and nothing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer that violated an express condition of probation or from using the probationer's silence as "one of a number of factors to be considered by a finder of fact" in deciding whether other conditions of probation have been violated.' [Citation.]" (*Valdivia, supra,* 16 Cal.App.5th at pp. 1140-1141.) If defendant refuses to provide his electronic device data he may be in violation of the terms of probation and may have his probation revoked, but the existence of the condition does not presently violate the Fifth Amendment. (*Valdivia,* at p. 1141.) Thus, this court has held, and we agree, that a challenge to an electronic storage device search condition under the Fifth Amendment is without merit. (*Valdivia,* at p. 1141.)

DISPOSITION

The order granting probation is modified by striking the following condition: "P.C. 1546 searchable - Defendant shall submit his/her person, place, property, automobile, electronic storage devices, and any object under his/her control, including but not limited to cell phones and computers, to search and seizure by any law enforcement officer or probation officer, any time of the day or night, with or without a warrant, with or without his/her presence or further consent." The case is remanded to the trial court for further proceedings consistent with this opinion.

/s/
Blease, Acting P. J.

I concur:

/s/
Butz, J.

Hull, J.

I concur in Parts I, II, III, and V of the majority opinion, but I dissent as to Part IV.

My first concern is practical. Given the breadth and depth of information that can be stored on a modern smart phone, how is a trial court to craft a condition of probation "limited to data on defendant's electronic devices that is *reasonably likely to contain indicia of drug sales.*" (Maj. opn. at p. 15.) Would this include electronic mail? Text messages? Internet searches? Contacts? Calendars? Photos? Personal videos? You Tube videos? Weight and liquid conversion tables? Map searches? Electronic notes? Electronic calculators? Voice memos? Commercial flight schedules?

Where does it end given modern technology? What sites that store "data" is the court to find that would *not be reasonably likely to contain indicia of drug sales*? It seems to me we are embarking on a fool's errand of having the courts decide the legality of searching each and every of a practically unlimited laundry list of smart phone software programs and applications for those that may contain data indicating drug sales; programs and applications that grow probably by the hundreds if not the thousands each day?

In any event, I find it significant that, defendant agreed to submit "his . . . person, property and automobile and any object under [his] control to search and seizure in or out of the presence of the defendant, by any law enforcement officer and/or probation officer, at any time of the day or night, with or without his . . . consent, with or without a warrant." Defendant also agreed that he would "not knowingly use, handle or possess controlled substances of any kind unless lawfully prescribed to" defendant, that he would "not associate with persons he . . . knows to be illegal users or sellers of marijuana, dangerous drugs or narcotics, nor be in places where he . . . knows illegal narcotics and/or dangerous drugs are present" and that he would "obey all laws applicable to" him.

The search of a smart phone is no more burdensome or intrusive of his privacy than these unchallenged conditions - conditions that have long been sanctioned in the law

- that are simply intended to search for evidence of continuing criminality or an unwillingness to comply with the law in contravention of a defendant's promises to the court, promises made to gain leniency in sentencing. Where does the difference lie?

Recognizing that the issue of the scope of probation conditions relating to the search of mobile phones is now pending before our Supreme Court (See, *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, No. S230923; *People v. Valdivia* (2017) 16 Cal.App.5th 1130 review granted Feb. 14, 2018, No. S245893), I find persuasive (Cal. Rules of Court, rule 8.1115(e)(1)) the Fourth District Court of Appeal's opinion in *People v. Trujillo* (2017) 15 Cal.App.5th 574, review granted November 29, 2017, No. S244650. I would follow that holding here and reject defendant's assertion that the search condition relating to his mobile telephone was overbroad.

/s/
Hull, J.